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In The

Supreme Court of the United States

October Term, 1962

No. [redacted] 901

W. K. CUNNINGHAM, JR., SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,

Petitioner

v.

CLAUDE O. JONES, JR.,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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In The

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W. K. CUNNINGHAM, JR., SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,

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v.

CLAUDE O. JONES, JR.,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PRELIMINARY STATEMENT

W. K. Cunningham, Jr., Superintendent of the Virginia State Penitentiary, prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Fourth Circuit entered on January 16, 1963.

OPINIONS BELOW

The initial opinion of the District Court was filed on March 20, 1961, and is not reported (*Jones* v. *Cunningham*, Miscellaneous No. 3241, U. S. Dist. Ct., E. D. Va.). It will be found in Appendix I.

The initial opinion of the court below was filed on Janu-

ary 3, 1962 (*Jones* v. *Cunningham*, 297 F. 2d 851). It will be found in Appendix II.

The opinion of the District Court dismissing the petition after a full hearing, which was filed on June 7, 1962, is not reported (*Jones* v. *Cunningham*, Miscellaneous No. 3241, U. S. Dist. Ct., E. D. Va.). It will be found in Appendix III.

The opinion of the court below of January 16, 1963, is not yet reported (*Jones* v. *Cunningham*, ... F. 2d .....). It will be found in Appendix IV.

THE JUDGMENT

The judgment of the court below was entered on January 16, 1963, and will be found in Appendix V.

JURISDICTION

The jurisdiction of this court to issue the writ of certiorari in the case at bar is grounded upon 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Is a circuit court of appeals vested with the jurisdiction to determine a question of Virginia law in a manner contrary to the decision of the Supreme Court of Appeals of Virginia?

2. Is the burden on the Commonwealth of Virginia in a habeas corpus proceeding to show by a preponderance of the evidence that the prisoner is legally detained?

3. Is a circuit court of appeals vested with the jurisdiction to order the discharge of a prisoner when he has other valid sentences to serve?

STATUTES INVOLVED

Section 19-232, Code of Virginia (1950).

Section 19.1-259, Code of Virginia (1950), as amended.

28 U. S. C. 1254(1).

STATEMENT OF THE CASE

On August 8, 1951, Claude O. Jones, Jr., hereinafter called the prisoner, was arrested by law enforcement officers at his mother's farm in Lunenburg County, Virginia. On that day two warrants were served upon him and, on August 11, 1951, additional warrants were prepared and served upon him.

The prisoner was interrogated by the Virginia State Police and made a full confession (Respondent's Exhibit I). On August 14, 1951, the prisoner, without advice of counsel, waived a preliminary hearing, in the County Court of Lunenburg County.

On August 17, 1951, the Judge of the Circuit Court of Lunenburg County appointed C. F. Blackwell, the senior attorney at the Lunenburg bar, to represent the prisoner. On August 18, 1951, the prisoner, represented by Mr. Blackwell, waived indictment, agreed to be tried on Informations filed by the Commonwealth's Attorney, pled guilty, was found guilty, and the cases were continued in order that a pre-sentence report could be prepared by the probation officer. On August 30, 1951, the report was filed, and the prisoner was sentenced to a total term of thirty-nine years in the Virginia State Penitentiary.

The prisoner has an additional eight years to serve on sentences imposed upon him in other courts.

The prisoner filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia, Richmond Division, in which he alleged that he was denied medical attention by the police officers until he confessed; that he was held incommunicado and not allowed to contact his family, and that he was not effectively represented by his court-appointed attorney.

On March 20, 1961, the petition for a writ of habeas corpus was denied by the United States District Court for

the Eastern District of Virginia, Richmond Division, without a hearing (see Appendix I). On January 3, 1962, the United States Court of Appeals for the Fourth Circuit reversed the District Court, and ordered that a hearing be held (see Appendix II). (*Jones* v. *Cunningham*, 297 F. 2d 851 (Fourth Circuit, 1962)). On January 7, 1962, the United States District Court for the Eastern District of Virginia, Richmond Division, after a full hearing, in an opinion denied the petition (see Appendix III). On January 16, 1963, the United States Court of Appeals for the Fourth Circuit reversed the District Court and ordered that the petitioner be discharged from custody, unless the Superintendent apply to this court for certiorari, or unless the Commonwealth retried the prisoner.

ARGUMENT

Your petitioner will demonstrate on the following pages that the court below has ignored established principles of law in reaching the decision in the case at bar. More ver; it will be shown that the court below has also failed to give proper weight to the testimony of the witnesses, and that the decision in the premises is based upon abstract speculations rather than the realities of the case.

I.

The Court Erred in Deciding a Question of Virginia Law Contrary to the Decisions of the Supreme Court of Appeals of Virginia

The prisoner was charged with breaking and entering an automobile dealer's office with the larceny of certain items found in the automobile dealer's office; with breaking and entering a supermarket, with the larceny of certain items from the supermarket; with the breaking and entering of a movie theater office, and with the possession of burglar's tools.

The provision of Virginia law then in effect which was misconstrued by the court below is Section 19-232 of the Code of Virginia (1950), and reads as follows:

> "§ 19-232. Offense against two or more statutes or ordinances.—If the same act be a violation of two or more statutes, or of two or more municipal ordinances, or of one or more statutes and also one or more ordinances, conviction under one of such statutes or ordinances shall be a bar to a prosecution or proceeding under the other or others. Furthermore, if the same act be a violation of both a State and a federal statute a prosecution or proceeding under the federal statute shall be a bar to a prosecution or proceeding under the State statute. (Code 1919, § 4775; 1920, p. 99; 1948, p. 109.)" (Now § 19.1-259, Code of Va., (1950), as amended)

In construing the statute, the court below observed:

> "As construed by the Supreme Court of Appeals of Virginia, the statute permits the prosecution to charge both breaking and entering with intent to commit larceny and the larceny itself as one continuous act.[6] But while the Commonwealth may file dual accusations, it may not obtain more than one conviction.[7] Here there

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[6] "*Clark* v. *Commonwealth*, 135 Va. 490, 115 S. E. 704 (1923)."

[7] "*Clark* v. *Commonwealth*, *supra*, 115 S. E. at 706, explicitly states that '[w]here the breaking and entering with intent to commit larceny and the commission of the larceny are one continuous act, the accused *can only be convicted of the offense of breaking and entering with intent to commit larceny*. * * *.' (Italics added). Cf *Smyth* v. *Morrison*, 200 Va. 728, 107 S. E. 2d 430, 434-35 (1959). The Commonwealth relies upon *Benton* v. *Commonwealth*, 91 Va. 728, 21 S. E. 495 (1895), for the proposition that an accused may be punished for both larceny and storebreaking if separate counts are inserted in the indictment or information. However, that case was decided prior to enactment of the statute quoted in the text, the manifest purpose of which was to eliminate the hardship inherent in prosecutions under two statutes based upon a single criminal transaction. See *Owens* v. *Commonwealth*, 129 Va. 757, 105 S. E. 531 (1921)."

were not only dual convictions, but cumulative penalties."

In the case at bar the prisoner was charged in separate informations with breaking and entering an automobile dealer's office, with the larceny of certain items from the automobile dealer's office; with breaking and entering a supermarket, and with the larceny of certain items from the supermarket. Of course, the prisoner was charged with other offenses which are not material to this discussion.

The language from the opinion below, which is quoted above, indicates that the court held that under Virginia law an accused may be charged in separate informations or indictments with breaking and entering and grand larceny, but that the accused may be convicted of only one offense. This is not the law in Virginia as adjudicated by the Supreme Court of Appeals of Virginia, the highest court in the Commonwealth. If the prisoner had been charged in a single information with breaking and entering and larceny, he could only have been convicted of one offense. This, however, is not the situation in the case at bar. The following language from *Robinson* v. *Commonwealth*, 190 Va. 134, 138-140, 56 S. E. 2d 367, is a dispositive statement of Virginia law on the subject:

"The indictment in the same count also properly charges the petitioner with grand larceny. However, under the decisions of this court, while two separate and distinct charges, one of housebreaking with intent to commit larceny, and the other of grand larceny, may be made in a single count, an accused may be found guilty of either of the offenses but there can be only one penalty imposed. In *Benton's Case*, 91 Va. 782, at page 788, 21 S. E. 495, we stated the rule to be: 'Housebreaking with the intent to commit larceny, and grand larceny are distinct offenses under the law, and to each

is affixed its own penalty, but they may be and often are one continued act, and may be charged in the same count of an indictment. Upon such count the accused may be found guilty of either of the offenses, but there can be only one penalty imposed. *Commonwealth* v. *Hope*, 22 Pick. (39 Mass.) 1; *Josslyn* v. *Commonwealth*, 6 Mete. (47 Mass.) 236; and Bish. on Cr. Pr. Vol. 2, Sec. 144. If it is desired to punish for both offences in a case of this kind, there must be inserted in the indictment a separate count for the larceny, as was done in *Speer's Case*, 17 Gratt. (58 Va.) 570."

"In *Clark* v. *Commonwealth*, 135 Va. 490, 115 S. E. 704, the indictment contained a single count and charged the defendant with breaking and entering a certain railroad car with intent to commit larceny therein and the larceny from the car of articles of the value of $150. This court again applied the rule that where an accused is charged with breaking and entering with intent to commit larceny and the commission of the larceny, he might be convicted of either offense but not of both. The court further held that it was permissible to charge in one count not only the breaking and entering with intent to commit larceny but also larceny at the same time, as one continuous act, the larceny in such case being the best evidence of the intent with which the breaking was committed.

"In *Walters* v. *Commonwealth*, 159 Va. 903, 165 S. E. 495, the indictment contained only one count. It charged housebreaking and larceny. The verdict was a general finding of guilty. It did not specify whether the accused was found guilty of housebreaking or larceny. We held that under such circumstances, under well-recognized principles, the finding would be considered as one of guilty of housebreaking, the major offense. See *Speer's Case*, 17 Gratt. (58 Va.) 570; *Vaughan's Case*, 17 Gratt. (58 Va.) 576, and *Myers* v. *Commonwealth*, 132 Va. 746, 111 S. E. 463. But see *Benton's Case*, *supra* (91 Va. at pp. 791-792), where it is held that breaking and entering and grand larceny are equal in grade.

> "In *Branch* v. *Commonwealth*, 184 Va. 394, 35 S. E. (2d) 593, the accused was charged with two separate crimes, one of breaking and entering in the night-time with intent to commit larceny, and the other of feloniously stealing, taking and carrying away goods of the value of $1,502. We reiterated the rule that housebreaking with intent to commit larceny, and grand larceny, are distinct offenses under the law, and to each is affixed its own penalty, but they may be and often are one continued act, and may be charged in the same count of an indictment. The accused may be found guilty of either of the offenses, but only one penalty may be imposed. See, also, *Harris* v. *Commonwealth*, 185 Va. 26, 37 S. E. (2d) 868." (190 Va. pp. 138, 139, 140).

In view of the foregoing statement of the law by the Supreme Court of Appeals of Virginia, it is manifest that the court below construed the aforesaid provision of Virginia law in a manner contrary to the views expressed therein. As a demonstration of the invalidity of the petitioner's conclusion in the premises, the court's attention is respectfully directed to the testimony of the Attorney for the Commonwealth for Lunenburg County, wherein he stated that it was customary procedure in his court to charge both offenses (Tr. 131).*

It is a basic constitutional principle that the construction of State laws is the exclusive responsibility of the State courts. (*Speiser* v. *Randall*, 357 U. S. 513.) Interpretation of State legislation is the function of the State courts, and the construction given to a State statute by the State court is binding upon the Federal courts. (*Albertson* v. *Millard*, 345 U. S. 242.) The construction of a State code by the highest court of the State is binding on the Supreme Court

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*All references are to pages of the typewritten transcript.

of the United States. (*United States* v. *Burnison*, 339 U. S. 87.) For the foregoing reasons, it is submitted that the court below erred in interpreting Section 19-232 of the Code of Virginia, in that it construed the aforesaid provisions of Virginia law in a manner contrary to the decisions of the Supreme Court of Appeals of Virginia. This action on the part of the court below is in the teeth of the cited decisions of this court holding that the interpretation of State laws lies in the State courts, and that such an interpretation is binding upon the State courts.

For these reasons it is submitted that the writ of certiorari should issue because of this manifest error on the part of the court below.

II.

The Court Erred in Holding That the Burden Was on the Commonwealth to Establish by a Preponderance of the Evidence That the Prisoner Is Legally Detained.

The decision of the court below was based upon the fact that the Commonwealth had failed to show that the petitioner was legally detained. The rule of law enunciated by the court below in the case at bar is contrary to the decisions of this court; is contrary to the decisions of other circuit courts of appeal and, indeed, is contrary to the previous decisions of the United States Court of Appeals for the Fourth Circuit. A brief review of the evidence will support the Commonwealth's theory in the premises.

In the first instance, the misstatement of the applicable provision of Virginia law forms a portion of the basis for the decision below. It was the established practice in Lunenburg County, Virginia, to charge both breaking and entering and grand larceny in separate Informations or indictments, and this procedure was based upon the cases previously cited in this brief (Tr. 131). It is important to

emphasize that this was a question of evidence, and there is no suggestion in the opinion of the court below that there was insufficient evidence to convict the prisoner of both charges.

A review of the evidence adduced at the habeas corpus hearing reveals that the prisoner was fully advised as to his constitutional rights by the police officers (Tr. 77, 95, 105, 106), and that no promises or threats were made by them (Tr. 72, 79, 95). The prisoner was interrogated briefly on the day of his arrest (Tr. 75, 76, 87), and not on the next day at all (Tr. 75, 85). He was interrogated briefly on the third day after his arrest, and at this time he made the confession (Respondent's Exhibit 1). The prisoner wrote the terminal paragraph of his confession in his own handwriting (Tr. 80). The Judge of the Circuit Court of Lunenburg County explained to the prisoner his constitutional rights (Tr. 126, 127), and the prisoner stated that he desired to be tried at once (Tr. 125).

The prisoner testified that he had lost a great deal of blood at the time he was arrested; that he was suffering from this loss of blood and the delirium tremens at the time he signed the confession (Tr. 7, 20), and that he was so nervous that it was necessary Investigator Tucker to hold his hand in order that he could sign the confession (Tr. 64). He testified that he had been questioned almost around the clock (Tr. 21); that he had been promised leniency (Tr. 46), and that he was not advised of his constitutional rights. The testimony of the attorney who represented the prisoner at the time of his convictions was stipulated, because the attorney was ill in the Veterans Hospital in Richmond. Prior to this time, the attorney had made an affidavit wherein he set forth his recollection of the case. This affidavit, which was made before the attorney became ill, will

be found in the record. It is true that the attorney was not appointed until the day before the trial.

This court has heretofore held that the burden is upon the petitioner in a habeas corpus proceeding to convince the trier of the facts by a preponderance of the evidence that he is illegally detained. (*Hazek* v. *Olson*, 326 U. S. 271; *Walker* v. *Johnston*, 312 U. S. 275; *Johnson* v. *Zerbst*, 304 U. S. 458.) The cited cases hold that if the petitioner does not carry the burden imposed upon him, it is the duty of the court to deny the writ.

The court below has held to the contrary. The following cases from other circuits are also at variance with the decision in the case at bar: *Farrell* v. *Lanagan*, 166 F. 2d 845 (First Cir.); *Coggins* v. *O'Brien*, 188 F. 2d 130 (First Cir.); *Schechtman* v. *Foster*, 172 F. 2d 339 (Second Cir.); *United States, ex rel. Cooper* v. *Dimmo*, 221 F. 2d 626 (Third Cir.); *Goldsby* v. *Harpole*, 249 F. 2d 417 (Fifth Cir.); *U. S. ex rel. Townsend* v. *Sain*, 276 F. 2d 324, (Seventh Cir.); *Thompson* v. *Overlade*, 216 F. 2d 492 (Seventh Cir.); *Lyle* v. *Eidson*, 182 F. 2d 344 (Eighth Cir.); *Sampsell* v. *California*, 191 F. 2d 721 (Ninth Cir.); *Carlson* v. *Landon*, 112 F. 2d 451 (Ninth Cir.); *Odell* v. *Hudspeth*, 189 F. 2d 300 (Tenth Cir.).

The previous decisions of the United States Court of Appeals of the Fourth Circuit on the question of burden of proof are also contrary to the decision in the case at bar. (*Snead* v. *Smyth*, 273 F. 2d 838 (Fourth Cir.); *Stewart* v. *Smyth*, 288 F. 2d 362 (Fourth Cir.); *Pannell* v. *Cunningham*, 302 F. 2d 653 (Fourth Cir.).)

An analysis of the foregoing decisions of the Fourth Circuit and other circuit courts of appeals reveals that these decisions are contrary to the decision in the case at bar. It has been heretofore held by this court and by the Circuit Courts of Appeal, including the Fourth Circuit, that the

burden is on the petitioner in a habeas corpus proceeding to show by a preponderance of the evidence that he is illegally detained.

The cited cases also stand for the proposition that the burden is a heavy one, and that the petitioner must overcome the strong presumption of the constitutional regularity of State judicial proceedings. (*Darr* v. *Burford*, 339 U. S. 200.)

In the case at bar the court below has departed from judicial precedent in reaching the decision in the premises. The court ignored the overwhelming weight of evidence produced on behalf of the Commonwealth at the hearing in the District Court. It is suggested in the opinion that the attorney might have objected to the introduction of the confession in evidence. The court fails to hold that the confession was obtained by illegal means. Indeed, a review of the evidence reveals that the petitioner freely confessed to the charges.

While there are many misstatements of fact contained in the opinion, we will allude to only one more. In the opinion it is stated categorically that the prisoner had not been in touch with his friends or with his family while in the county jail. A review of the evidence reveals that the prisoner was arrested on his mother's land, in the presence of his uncle, and that his uncle was present at the preliminary hearing.

It has been held that the credibility of the witnesses is for the trier of the facts to determine. (*Hawk* v. *Olson*, 326 U. S. 271.) Prior to the decision of the court below in the case at bar, this rule had been followed in the Fourth Circuit. (*Bolling* v. *Cunningham*, 303 F. 2d 639.) In the case at bar the Fourth Circuit has substituted its judgment for the judgment of the District Court as to the credibility of the witnesses, and has chosen to believe all of the testimony given by the petitioner and none of the testimony

given by witnesses on behalf of the Commonwealth. This view of the case by the Fourth Circuit is clearly erroneous under the aforesaid decision of this court.

One final matter deserves comment. The Fourth Circuit ignored the affidavit made by Mr. Blackwell some years ago. The court held that the District Court should not have considered this affidavit and based its decision on this court's holding in *Walker* v. *Johnston*, 312 U. S. 275. In the cited case it was held that it was improper to use ex parte affidavits in a habeas corpus proceeding in order to dismiss the matter without a hearing. The circumstances in the case at bar are different from those in the cited case. Mr. Blackwell has been ill for some years. Since he made the affidavit in connection with this case his has suffered several strokes, and at the time of the hearing in this matter, was confined at the Veterans Hospital in Richmond with some broken bones. It would have been impossible for him to testify in the habeas corpus hearing, and it would have endangered his health to have subjected him to extensive questioning relative to the case. He enjoyed an excellent reputation in his community prior to his illness. He was a well qualified attorney and highly thought of by the court and the members of the bar. Under these circumstances it would seem that it was entirely appropriate for the District Court to consider the affidavit of this attorney who was ill and unable to appear to testify.

For the foregoing reasons, it is submitted that the Fourth Circuit took an erroneous view of the applicable law in considering the evidence in the case at bar. Indeed, it is submitted that the court ignored the overwhelming evidence presented on behalf of the Commonwealth in the case. For these reasons the writ of certiorari should issue to review this question also.

III.

Did the Circuit Court Err in Ordering the Discharge of the Prisoner When He Had Other Valid Sentences To Serve?

The court's attention is respectfully directed to Exhibit I appended to the Answer filed in the District Court on behalf of the Commonwealth in this case. At the time of the hearing the prisoner was detained pursuant to a conviction for storebreaking. He is still detained pursuant to that conviction. Assuming that the prisoner continues to earn "good time," this sentence will expire on June 11, 1963. He then has to serve convictions for grand larceny, breaking and entering a storehouse and the possession of burglar's tools from the Lunenburg County Circuit Court. Of course, the court below has invalidated these convictions. The petitioner was sentenced to serve five years in the Circuit Court of Charlotte County for storebreaking, and three years in the Circuit Court of Louisa for housebreaking. The court below has not invalidated these sentences.

It is submitted that the court erred in declaring void the three remaining sentences which the prisoner had to serve from Lunenburg County, for the reason that the writ of habeas corpus lies only to test the validity of the petitioner's present detention. (*McNally* v. *Hill*, 293 U. S. 131.)

Since the prisoner has eight years of valid sentences to serve, it is submitted that the court erred in ordering that the Superintendent release him from custody. In the absence of any holding by the Circuit Court that the five-year sentence and the three-year sentence are void, it is submitted that the court was without authority to order the prisoner's release.

For these reasons it is submitted that the court erred in the form of relief granted the prisoner.

CONCLUSION

Your petitioner has demonstrated conclusively that the Circuit Court erred in interpreting a provision of Virginia law. It has been shown that the court ignored the overwhelming weight of evidence presented on behalf of the Commonwealth in this case in reaching its decision in the premises. It has been demonstrated that the court erred in ordering the prisoner's release when the prisoner has other valid sentences to serve. The conflict between the decision in this case and the decision of this court and of the other circuit courts of appeal on the question of burden of proof in a habeas corpus proceeding demonstrates beyond all doubt the error committed by the court in making its decision in the premises.

It is for these reasons that your petitioner prays that this court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in the premises.

Respectfully submitted,

ROBERT Y. BUTTON
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PROOF OF SERVICE

I, Reno S. Harp, III, one of the attorneys for the petitioner herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on this the

12th day of March, 1963, I served copies of the foregoing Petition for a Writ of Certiorari on the respondent herein by mailing the same in a duly addressed envelope, with first class postage prepaid, to his attorney of record, John W. Edmonds, III, Attorney at Law, State-Planters Bank Building, Richmond, Virginia.

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Assistant Attorney General